

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OSSIE GILES,
Plaintiff,
v.
RON DAVIS, et al.,
Defendants.

Case No. [18-cv-04724-YGR](#) (PR)

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

Plaintiff Ossie Giles, a state prisoner incarcerated at San Quentin State Prison, has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983, alleging the violation of his constitutional rights by prison employees. Plaintiff has filed a motion for leave to proceed *in forma pauperis*, which will be granted in a separate Order. For the reasons stated below, the Court DISMISSES this action without prejudice.

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Compliance with the exhaustion requirement is mandatory. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5 (2001). The administrative remedies need not meet federal standards, nor need they be “plain, speedy and effective.” *Porter*, 534 U.S. at 524.

Although non-exhaustion under Section 1997e(a) is an affirmative defense, a prisoner’s concession to non-exhaustion is a valid ground for dismissal. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003) (prisoner’s concession to non-exhaustion is valid ground for dismissal, as long as no exception to exhaustion applies), *overruled on other grounds in Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014). Accordingly, a claim may be dismissed without prejudice if it is clear from the record that the prisoner concedes that he did not exhaust administrative remedies. *See id.* The Ninth Circuit has interpreted Section 1997e(a) to mean that an action *must* be dismissed unless the prisoner exhausted his available administrative remedies

1 *before* he or she filed suit, even if the prisoner fully exhausts while the suit is pending. *See*
2 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

3 It is obvious from the face of Plaintiff's complaint that he did not exhaust his
4 administrative remedies *before* filing the instant suit. He states that as of July 29, 2018, the date
5 he signed the complaint, he submitted his 602 inmate appeal to the third level of review and he did
6 not receive a response, stating as follows: "As of 7-22-2018, there's no explanation for delay."
7 Dkt. 1 at 2. However, this reason is insufficient to excuse administrative exhaustion.
8 Furthermore, on August 29, 2018, Plaintiff informed the Court that, on August 18, 2018, he
9 "received [the] third level response." Dkt. 3 at 1. Because Plaintiff did not exhaust his claims
10 *prior to* filing this action, this action is DISMISSED without prejudice to re-filing these claims in
11 a new case. *See McKinney*, 311 F.3d at 1199-1201.

12 The Clerk of the Court shall terminate all pending motions and close the file.

13 IT IS SO ORDERED.

14 Dated: November 19, 2018

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17 YVONNE GONZALEZ ROGERS
18 United States District Court Judge
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